A **Institut Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd**

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W–02–69 OF 2005 AND W–02–76 OF 2005

B GOPAL SRI RAM, RICHARD MALANJUM AND TENGKU BAHARUDIN SHAH JJCA

2 SEPTEMBER 2007

C *Contract — Formation — Contract for sale of property — Parties agreed on certain terms — Purchaser paid 2% of purchase price — Balance of 8% to be paid upon signing of formal sale and purchase agreement — Purchaser failed to sign formal sale and purchase agreement on date specified — Whether there was legally binding contract — Whether subject to contract*

D *Land Law — Restraint on dealings — Caveat — Application for removal of — Failure to execute formal sale and purchase agreement — Purchaser failed to pay 8% of purchase price and sign formal sale and purchase agreement on date specified — Vendor forfeited deposit — Purchaser lodged caveat subsequently but close to one year later — Whether purchaser had caveatable interest in land — National Land Code ss 327 & 329*

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Institut Teknologi Federal Sdn Bhd ('FIT') was the registered proprietor of a piece of land on which it ran a college called the Federal Institute of Technology providing engineering courses. FIT entered negotiations with IIUM Education Sdn Bhd

F ('IIUM') to sell the said land. Salient terms were agreed upon by the parties but subject to a sale and purchase agreement being executed. The terms agreed included the sale price, the non-refundable earnest deposit of 2% of the sale price and the 8% of the purchase price would be payable on the execution of the sale and purchase agreement. The 2% earnest deposit was paid by IIUM. A draft sale and purchase

G agreement was forwarded by FIT's solicitors to IIUM's solicitors. IIUM sought an extension of time to pay the balance 8% of the purchase price. This was not agreed to by FIT and the earnest deposit was thereafter forfeited by FIT on 27 November 2003 for failure by IIUM to sign the sale and purchase agreement. IIUM lodged a private caveat over the said land on 24 November 2004 vide Presentation No 16005/2004. FIT then filed an application to court pursuant to ss 327 and 329 of

H the National Land Code for an order to have the caveat removed. The first High Court judge granted order in terms of FIT's application to remove the caveat ('the removal order'). However, the second High Court judge granted a stay of the removal order ('the stay order'). IIUM appealed against the removal order by the first High Court judge ('the appeal proper) whereas FIT appealed against the stay order

I by the second High Court judge ('the stay appeal').

Held, dismissing the appeal proper and allowing the stay appeal:

(1) The first critical issue is for a caveator to show the court that he has caveatable

interest entitled to be protected pending determination of his actual claim. If there is none then the caveat must be removed. If there is such interest the caveator is still required to prove that there are triable issues for the court to determine. Having established the first two prerequisites the final hurdle is to for the court to consider where the balance of convenience lies (see para 21).

(2) Although it was earlier agreed that within 14 days after the payment of the earnest deposit the sale agreement should be signed, it did not happen. Instead IIUM sought for a longer period. FIT in its letter dated 27 October 2003 stated that it could only agree until 31 October 2003 after which the earnest deposit would be forfeited. IIUM failed to meet the due date. All it did was to write to FIT directly vide its last letter dated 17 December 2003 stating that the earnest deposit should not be forfeited and to disclose that it was about to get the finance for the purchase. Nothing transpired after the last letter of IIUM to FIT. Such silence could be taken as a strong indicator that IIUM accepted the fate of the earnest deposit. Subsequently to state in Form 19B after a lapse of about a year after the forfeiture of the earnest deposit that some outstanding issues required further negotiation could hardly be described as reasonable and done in good faith premised on a belief that there was a completed sale (see paras 24–25).

(3) From the facts as disclosed in the affidavits filed and Form 19B at most there was negotiation on the sale but no concluded transaction came into existence. Negotiations for a contract, no matter how advanced, cannot amount to a contract (see para 26).

(4) It is settled that caveatable interest must be a definite right relating to land and capable of enforcement and a caveator must be in a position to institute a suit for specific performance of claim. The position of IIUM was made worse as it did not even commence action as at 31 December 2004 when the application by FIT for the removal of the caveat was heard. Indeed it was not rebutted that no action was filed to date in connection with the caveat (see para 27).

(5) The fact that there was payment of earnest deposit and that it should be refundable did not ipso facto provide to IIUM caveatable interest in the said land. Mere pecuniary interest in land does not entitle a person to lodge a caveat under s 323 of the National Land Code (see para 28).

[Bahasa Malaysia summary

Institut Teknologi Federal Sdn Bhd ('ITF') merupakan tuan punya berdaftar sebidang tanah yang mana terdapat sebuah kolej Institut Teknologi Federal yang memberikan kursus-kursus kejuruteraan. ITF telah mengadakan beberapa rundingan dengan IIUM Education Sdn Bhd ('IIUM') untuk menjual tanah tersebut. Terma-terma penting dipersetujui oleh pihak-pihak tetapi tertakluk kepada penyempurnaan satu perjanjian jualbeli. Terma-terma yang dipersetujui termasuklah harga jualan, deposit cengkeram yang tidak boleh dikembalikan sebanyak 2% daripada harga jualan dan 8% daripada harga belian hendaklah perlu dibayar dengan

penyempurnaan perjanjian jual beli tersebut. Deposit cengkeram 2% telah dibayar oleh IIUM. Satu perjanjian jual beli telah dikemukakan oleh peguam ITF kepada peguam IIUM. IIUM memohon lanjutan masa untuk membayar baki 8% daripada harga belian. Ini tidak dipersetujui oleh ITF dan deposit cengkeram tersebut akhirnya dirampas oleh FIT pada 27 November 2003 kerana kegagalan oleh IIUM untuk menandatangani perjanjian jual beli itu. IIUM telah memasukkan satu kaveat persendirian ke tas tanah tersebut pada 24 November 2004 melalui Serahan No 16005/2004. ITF kemudian memfailkan satu permohonan ke mahkamah menurut ss 327 dan 329 Kanun Tanah Negara untuk satu perintah agar kaveat tersebut dibatalkan. Hakim Mahkamah Tinggi yang pertama telah membenarkan perintah mengikut terma permohonan ITF untuk membatalkan kaveat itu ('perintah pembatalan'). Namun, hakim Mahkamah Tinggi yang kedua telah membenarkan satu penggantungan perintah pembatalan itu ('perintah penggantungan"). IIUM merayu terhadap perintah pembatalan oleh hakim Mahkamah Tinggi yang pertama ('rayuan sebenar') manakala ITF merayu terhadap perintah penggantungan oleh hakim Mahkamah Tinggi yang kedua ('rayuan penggantungan').

Diputuskan, menolak rayuan sebenar dan membenarkan penggantungan rayuan:

(1) Isu kritis yang pertama adalah untuk pengkaveat menunjukkan kepada mahkamah bahawa beliau mempunyai kepentingan kaveat yang perlu dilindungi sementara menunggu keputusan tuntutan sebenarnya. Jika tiada maka kaveat hendaklah dibatalkan. Jika wujud kepentingan sedemikian maka pengkaveat masih perlu membuktikan bahawa terdapat isu-isu yang perlu dibicarakan untuk keputusan mahkamah. Setelah membuktikan dua pra syarat pertama halangan terakhir adalah untuk mahkamah mempertimbangkan di mana terletaknya imbangan kesesuaian (lihat perenggan 21).

(2) Meskipun telah dipersetujui sebelumnya bahawa dalam 14 hari selepas bayaran deposit cengkeram perjanjian jualan patut ditandatangani, ia tidak berlaku. Sebaliknya IIUM memohon tempoh lebih lama. ITF dalam suratnya bertarikh 27 Oktober 2003 menyatakan bahawa ia hanya bersetuju sehingga 31 Oktober 2003 dan selepas itu deposit cengkeram itu akan dirampas. IIUM gagal menepati tarikh tersebut. Ia hanya menulis kepada ITF secara terus melalui surat terakhirnya bertarikh 17 Disember 2003 yang menyatakan bahawa deposit cengkeram itu tidak patut dirampas dan menyatakan bahawa ia akan mendapat wang untuk belian itu. Tiada apa berlaku selepas surat terakhir IIUM kepada ITF. Ini adalah petanda bahawa IIUM menerima hakikat deposit cengkeram itu. Berikutan itu untuk menyatakan dalam Borang 19B selepas lebih kurang setahun rampasan deposit cengkeram bahawa isu-isu yang belum selesai memerlukan rundingan selanjutnya tidak boleh dianggap sebagai munasabah dan dilaksanakan dengan niat baik berasaskan kepercayaan bahawa terdapat jualan yang telah disempurnakan (lihat perenggan 24–25).

(3) Berdasarkan fakta seperti yang dikemukakan dalam afidavit-afidavit yang telah difailkan dan Borang 19B lebih-lebihpun terdapat rundingan berhubung

jualan itu tetapi tidak terdapat transaksi yang telah disempurnakan. Rundingan untuk satu kontrak, bagaimanapun dikemukakan, tidak membentuk satu kontrak (lihat perenggan 26).

(4) Adalah tetap bahawa kepentingan yang boleh dikaveatkan perlu merupakan hak yang ditetapkan berkaitan tanah dan boleh dikuatkuasakan dan pengkaveat hendaklah berada dalam kedudukan untuk memulakan satu guaman untuk pelaksanaan spesifik tuntutan. Kedudukan IIUM menjadi teruk kerana ia tidakpun memulakan tindakan pada 31 Disember 2004 apabila permohonan oleh ITF untuk pembatalan kaveat didengar. Sememangnya ia tidak dipatahkan bahawa tiada tindakan telah difailkan sehingga kini berkaitan dengan kaveat itu (lihat perenggan 27).

(5) Fakta bahawa terdapat bayaran untuk deposit cengkeram dan bahawa ia patut dikembalikan tidak secara ipso facto diperuntukkan untuk kepentingan IIUM untuk mengkaveat dalam tanah tersebut. Kepentingan kewangan semata-mata dalam tanah tidak memberikan hak kepada seseorang memasukkan kaveat di bawah s 323 Kanun Tanah Negara (lihat perenggan 28).]

Notes

For cases on caveat, restraint of dealings, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3480–3824.

For cases on contract for sale of property, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3673–3676.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327 (refd)

Hing Kim Pong v Teo Eng Jin [1980] 1 MLJ 43 (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausha Makmur Bhd [2004] 1 MLJ 257 (refd)

Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782 (refd)

Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44 (refd)

Sinar Wang Sdn Bhd v Ng Kee Seng [2005] 2 MLJ 42 (refd)

Legislation referred to

National Land Code ss 327, 329

Appeal from: Originating Summons No S6–24–2682 of 2004 (High Court, Kuala Lumpur)

Bharti Seth (Sumathi Krishnan with her) (Bharti Seth & Associates) for the appellant in Civil Appeal No W-02–69 of 2005.

Watson Peters (Amerjit Singh with him) (Watson Peters & Mohd Fuad) for the respondent in Civil Appeal No W-02–69 of 2005.

Watson Peters (Amerjit Singh with him) (Watson Peters & Mohd Fuad) for the appellant in Civil Appeal No W-02–76 of 2005.
Bharti Seth (Sumathi Krishnan with her) (Bharti Seth & Associates) for the respondent in Civil Appeal No W-02–76 of 2005.

Richard Malanjum JCA (now CJ (Sabah and Sarawak) (delivering judgment of the court):

[1] There are two appeals before us. One appeal (W–02–76–2005) ('the appeal proper') is by IIUM Education Sdn Bhd ('IIUM') against the order made by James Foong J (as he then was) ('the first learned High Court judge') of the Kuala Lumpur High Court given on 31 December 2004 ('the removal order') allowing the application by FIT Teknologi Federal Sdn Bhd ('FIT') to remove the caveat lodged by IIUM on a parcel of land measuring approximately 4 acres held under Title No HS(D) No 83192, Lot No 12734, situated in the Mukim and District of Kuala Lumpur, Wilayah Kuala Lumpur ('the said land'). The other appeal (W–02–69–2005) (the stay appeal) is by the FIT against the granting of stay of the removal order ('the stay order') given by Abdul Malik Ishak J (as he then was) ('the second learned High Court judge') of the Kuala Lumpur High Court on 17 January 2005.

[2] When the stay appeal came up for hearing on 27 January 2005 this court suggested and the parties agreed that the appeal proper should be heard first and to be followed by the stay appeal. Hence we proceeded to hear the appeals in that sequence.

[3] After hearing the parties in the appeal proper we dismissed the appeal with costs and affirmed all the orders given by the first learned High Court judge. In respect of the stay appeal we also heard the parties and at the conclusion of the arguments we allowed the appeal with costs here and below. We also refused stay pending application for leave to the Federal Court. Further, we ordered that the caveat lodged was to be removed forthwith and direct the Registrar of Titles to register the instrument of transfer in respect of the said land.

[4] Briefly the facts are as follows. FIT was running a college called the Federal Institute of Technology providing engineering courses. As it did not wish to continue as a college FIT being the registered owner of the said land was keen to sell it to any interested purchaser. Thus in May 2003 IIUM approached FIT with a view to purchase the said land. Negotiation between the parties commenced with the salient terms agreed upon during a meeting held on 13 June 2003 but subject to a sale agreement being executed. Some of the terms agreed were that the total price would be RM16,500,000, that non-refundable earnest deposit of RM330.000 equivalent to 2% of the purchase price was to be fully paid by the end of June 2003, that 8% of the purchase price would be payable on the execution of the sale agreement which

must be signed by 28 June 2003. It was also an agreed term that the earnest deposit would be forfeited in the event IIUM failed to sign the sale agreement by 28 June 2003. A

[5] However the due dates as agreed upon were not strictly complied with. Instead there were exchanges of correspondences between the solicitors acting for the respective parties. The earnest deposit was only paid on 3 September 2003. B

[6] Subsequently on 9 September 2003 a draft of the sale agreement was sent by the solicitors of FIT to the solicitors of IIUM with request for comments on the draft. Unfortunately despite several reminders the solicitors for IIUM could only reply vide their letters dated 7 October 2003 and 6 November 2003 indicating that they were still waiting for a reply from IIUM. Further correspondences between the solicitors of the parties indicated that IIUM sought for an extension of time to 31 January 2004 in paying for the balance of the purchase price. FIT by its letter dated 27 October 2003 did not agree to the request for extension of time and insisted that the sale agreement must be signed by 31 October 2003 failing which the 2% earnest deposit would be forfeited. C D

[7] By a letter dated 27 November 2003 the solicitors of FIT wrote to the solicitors of IIUM informing on the forfeiture of the earnest deposit due to the failure of IIUM to sign the sale agreement. In a letter dated 17 December 2003 IIUM wrote directly to FIT stating that the earnest deposit should not be forfeited and that it was in the process of getting the finance for the purchase price which should be completed by mid January 2004. E

[8] However since that letter of 17 December 2003 there was no further development or any step taken by IIUM. F

[9] Hence, the said land was offered for sale and in early July 2004 FIT received an offer from Macro System Consultancy (MSC) to buy the said land for RM19,970,000. On 22 July 2004 a sale and purchase agreement was entered into between FIT and MSC. Under the Agreement the extended period for completion was stipulated to be 31 December 2004. There was indeed an urgency to settle the transaction. G

[10] Thus to pay for the balance of the purchase price MSC applied and obtained approval for a loan facility amounting to RM17,000,000 from Bumiputra-Commerce Bank ('BCBB'). Payments were also made by MSC for the full duty on both Form 14A and the loan documentations amounting to RM583,000 and RM85.000 respectively plus other legal costs incurred. H

[11] To complete the sale the solicitors for BCBB went on to present all the relevant documents at the land office on 1 December 2004. However the I

presentation could not take effect as IIUM had lodged a caveat on the said land on 24.11.2004 via presentation No 16005/2004 ('the caveat').

[12] In Form 19B together with the accompanying statutory declaration required for the lodgment of the caveat the reasons given by IIUM were, inter alia, that it had agreed to purchase the said land for RM16,500,000 with earnest deposit paid amounting to RM330,000, that during the negotiation on the terms of sale to be incorporated in a sale and purchase agreement to be executed there were some issues which could not be agreed upon by the parties, that pending the settlement of those issues entry of a caveat was necessary and that IIUM was still prepared, willing and able to purchase the said land.

[13] Failure by FIT to deliver the said land free from any encumbrances by 31 December 2004 would be deemed to be a default act thereby entitling MSC to claim for damages including exemplary damages against FIT.

[14] An application under ss 327 and 329 of the Code was therefore made to the court by FIT for an order to have the caveat removed. It was heard by the first learned High Court judge who granted the removal order basically on the ground that IIUM had no caveatable interest on the said land. But the stay order was subsequently given by the second learned High Court judge. Hence appeals were lodged to this court against the respective orders.

THE APPEAL PROPER: APPEAL AGAINST THE REMOVAL ORDER

[15] Before us learned counsel for IIUM submitted that the application to remove the caveat should have been dismissed in limine as no cause of action was disclosed. He went on to say that there was a specifically enforceable agreement concluded since FIT agreed to sell the said land to IIUM and earnest deposit was paid. Learned counsel further argued that except for one issue all the other principal terms had been agreed upon. He submitted that there were triable issues and the balance of convenience warranted for the caveat to be retained.

[16] For FIT it was submitted that IIUM had no caveatable interest to maintain the caveat since there was no concluded sale agreement and that the earnest deposit had been forfeited due to the failure of IIUM to execute a sale agreement within the extended period given by FIT or to make any payment for the balance of the agreed purchase price.

[17] Now, s 323 (1) of the National Land Code ('the Code') which deals with private caveat provides, inter alia:

> (1) The person or bodies at whose instance a private caveat may be entered are —
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest" ….

[18] In her book *National Land Code: A Commentary* (2nd Ed) at 743, author Judith Sihombing opined that a 'private caveat procedure is designed to protect a registrable interest or a right to such interest' and that 'the only parties able to caveat are those who may effect dealings with land or interests with land under the Code. She went on to state that the words 'itle … in alienated land' refer to the statutory or legal estate and illustrate that the claimant expects to become the proprietor of the land on completion of the transaction behind the caveated claim; and 'registrable interest in … alienated land' refer to the obtaining of a registered interest, for example a lease or a charge, which the caveator, expects to hold on completion of the transaction behind the caveated claim. This interest must be one which is recognized by the Code as capable of being registered to produce a statutory interest. As to the scope of registrable interest the learned author wrote that it is one 'which gives its holder an immediate right to have a substantive entry made on the register, ie registration; for example the purchaser of land, who has paid all purchase money, received a transfer in registrable form, and the issue document of title is registrable.'

[19] Section 327(1) of the Code provides for an aggrieved person or body to apply to the court for the removal of a private caveat. It reads:

> Any person or body aggrieved by the existence of a private caveat may at any time apply to the court for an order for its removal, and the Court … may make such order on the application as it may think just.

[20] Although the aforementioned section does not stipulate any guideline on how to approach such an application this court in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [199511 MLJ 719 succinctly laid down a three-stage test which must be considered when evaluating whether a caveat ought to be removed or allowed to remain on land. The three-stage test was expressed in these terms:

> The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then cadit quaestio, and the caveat must be removed without the necessity of going any further...
>
> The matter does not come to an end once the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case....
>
> The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* [[1979] 2 MLJ 212] as 'the balance of convenience'.. As to the matters that go to determine in which direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong* that mere repetition becomes unnecessary.

[21] In summary therefore the first critical issue is for a caveator to show the court that he has caveatable interest entitled to be protected pending determination of his

A actual claim. If there is none then the caveat must be removed. If there is such interest the caveator is still required to prove that there are triable issues for the court to determine. Having established the first two prerequisites the final hurdle is to for the court to consider where the balance of convenience lies.

B **[22]** It is also essential to understand that the purpose of a private caveat is to preserve the status quo pending the filing of action by a caveator to enforce his claim to an interest in the land (see *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44). Hence, it is trite law that a caveator must therefore pursue his claim promptly in a court of law failing which his caveat would be defeated as against the inalienable rights of the registered owner to enjoy his land (see *Jasalam (M) Sdn Bhd v Wong Koon Yee* [2000] 3 MLJ 115; *Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463).

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[23] Incidentally, it 'is axiomatic that negotiations for a contract, however advanced, do not amount to a contract …. Until and unless a purchaser has an D enforceable contract for the sale of land, he can lay no claim to the title to registered land. A fortiori, he has no interest that is capable of protection by the entry of a caveat' per Gopal Sri Ram JCA in *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782 (see also *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754).

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[24] Now, in the present appeal the contents of Form 19B indicate that the agreed purchase price was RM16,500,000 with the earnest deposit paid amounting to RM330,000 on 3 September 2003. Although it was earlier agreed that within 14 days after the payment of the earnest deposit the sale agreement should be signed it did not happen. Instead IIUM sought for a longer period. FIT in its letter dated F 27 October 2003 stated that it could only agree until 31 October 2003 after which the earnest deposit would be forfeited. IIUM failed to meet the due date. All it did was to write to FIT directly vide its last letter dated 17 December 2003 stating that the earnest deposit should not be forfeited and to disclose that it was about to get the finance for the purchase. Again nothing transpired after the last letter of IIUM G to FIT.

[25] It was only when an attempt to lodge the instrument in relation to the transaction with MSC that the caveat was discovered to have been lodged on 24 November 2004. Obviously IIUM did not do anything after its last letter to FIT. H Such silence could be taken as a strong indicator that IIUM accepted the fate of the earnest deposit. Subsequently to state in Form 19B after a lapse of about a year after the forfeiture of the earnest deposit that some outstanding issues required further negotiation could hardly be described as reasonable and done in good faith premised on a belief that there was a completed sale.

I **[26]** From the facts as disclosed in the affidavits filed and Form 19B we would say that at most is that there was negotiation on the sale but no concluded transaction

came into existence. Negotiations for a contract, no matter how advanced, cannot amount to a contract. The position of the parties in this appeal thus comes within the view expressed by this court in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327. His Lordship Gopal Sri Ram JCA delivering judgment for the Court said this at p 335:

> Meaning no disrespect to counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondences exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

(See also *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42).

[27] By the time the caveat was lodged FIT had long forfeited the earnest deposit after having given IIUM additional time to complete the transaction. Attempt by IIUM to seek for more time was refused. IIUM was also forewarned by FIT of its intention to forfeit the earnest deposit in the event that the transaction was not completed by the due date. However IIUM did not take any meaningful step except to write a letter to FIT saying that there should be no forfeiture and that it was about to get the finance for the purchase. Further IIUM never asserted that it was willing and able to pay or had tendered to FIT the balance of the purchase price. Hence, whatever arrangement or understanding that might have been made between the parties would have ceased long before the lodgment of the caveat. Accordingly we agree with the conclusion of the learned first High Court Judge that at the time of lodging the caveat IIUM had no caveatable interest in the said land. It is settled that caveatable interest must be a definite right relating to land and capable of enforcement and a caveator must be in a position to institute a suit for specific performance of claim. The position of IIUM was made worse as it did not even commence action as at 31 December 2004 when the application by FIT for the removal of the caveat was heard. Indeed it was not rebutted that no action was filed to date in connection with the caveat.

[28] The fact that there was payment of earnest deposit and that it should be refundable did not ipso facto provide to IIUM caveatable interest in the said land. Mere pecuniary interest in land does not entitle a person to lodge a caveat under s 323 of the Code (see *Registrar of Titles, Johore v Temenggong Securities Ltd*).

[29] In view of our foregoing determination it is obvious that the ground relied on by IIUM is insufficient in law to support a caveat. Accordingly we agree with the learned first High Court judge that the caveat must be removed without the necessity of considering the other subsequent steps as propounded in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor*.

[30] We therefore dismissed the appeal against the grant of the removal order with costs and affirmed all the orders given by the learned first High Court judge.

A THE APPEAL AGAINST THE STAY ORDER

[31] Learned counsel for FIT submitted that since the learned first High Court judge found there was no caveatable interest and ordered that the caveat should be removed the issue of stay should not arise. She cited the case of *Hing Kim Pong v Teo* B *Eng Jin* [1980] 1 MLJ 43.

[32] Learned counsel for IIUM argued that the stay order should be maintained due to the existence of special circumstances. He submitted that without the stay order the said land would be transferred to a third party and thus irrecoverable.

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[33] Having heard the respective submissions of counsel for the parties we were not convinced that there were special circumstances to justify the maintenance of the stay order. In *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausha Makmur Bhd* [2004] 1 MLJ 257 the Federal Court expressed a view on what constituted "special circumstances" thus at p 268:

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> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special E circumstance has been established. Thus, they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter related.

[34] The point raised as special circumstance is in our view insufficient. We are in F agreement with the first learned High Court judge that IIUM did not have any caveatable interest in the said land. There is therefore no reason for FIT to be made to wait according to the convenience of IIUM. Sufficient time had been given to it yet it failed to show any effort made to complete the transaction. For instance it waited for about one year before lodging the caveat. Then having lodged the caveat in such delayed time it has now failed to act promptly by filing an action in court to G prosecute its alleged enforceable contract cum caveatable interest in the said land. In our view it is a classic example of an abuse of process. The balance of convenience therefore tilts in favour of not allowing the stay order to continue. In fact it is unreasonable on the part of IIUM to insist for a stay of the removal order when it has nothing in the said land to be safeguarded.

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[35] For the foregoing reasons we allowed the appeal against the granting of the stay order with costs here and below. We also declined to give interim stay pending leave to appeal to the Federal Court. We ordered as well that the caveat be removed

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and that the Registrar of Titles to forthwith register the documents for transfer in respect of the said land.

Appeal dismissed. Stay appeal allowed.

Reported by Brendan Navin Siva